Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1186

MESCALERO APACHE TRIBE, an Indian Tribe duly organized under the laws of the United States of America; EUGENE KLEINKOLE; and CHARLES SMITH, JR.,

Petitioners,

—v.—

FRED J. RUSSELL, Acting Secretary of the Interior, Washington, D. C.; U. S. DEPARTMENT OF INTERIOR, Washington, D. C.; LOUIS R. BRUCE, Commissioner, Bureau of Indian Affairs, Washington, D. C.; and E. M. DAVIDSON, Area Personnel Officer, Albuquerque Area, Bureau of Indian Affairs, Albuquerque, New Mexico,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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December, 1970

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In the

Supreme Court of the United States

October Term, 1970

No. .....

Mescalero Apache Tribe, an Indian Tribe duly organized under the laws of the United States of America; Rogers Kanseah; and Charles Sierra, Jr.,

Petitioners,

—v.—

Fred J. Russell, Acting Secretary of the Interior, Washington, D. C.; U. S. Department of Interior, Washington, D. C.; Leon R. Brown, Commissioner, Bureau of Indian Affairs, Washington, D. C.; and E. M. Dawson, Area Personnel Officer, Albuquerque Area, Bureau of Indian Affairs, Albuquerque, New Mexico,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above cause on October 5, 1970, denying the claim that the individual petitioners, members of the Mescalero Apache Tribe and employees of the Bureau of Indian Affairs, were entitled to preference for employment retention over non-Indian employees, in accordance with the provisions of the Indian Preference Statutes, during a reduction in force conducted by the Bureau.

Opinions Below

The opinion of the Court of Appeals dated October 5, 1970, is set forth as Appendix A, pages 1a-10a, *infra*. It has not yet been reported. The order and memorandum opinion of the District Court for the District of New Mexico, dated February 16, 1979, are set forth as Appendix B, pages 11a-15a, *infra*. They are unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on October 5, 1970. The petition for a writ of certiorari is thus due on or before January 3, 1971. No petition for rehearing was filed below. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1964), by writ of certiorari granted upon the petition of any party. Original jurisdiction in the District Court was based on 28 U.S.C. §§ 1331 (a), 1346(a)(2), 1361 and 1362 (1964), and § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 704 (1964).

Question Presented

Whether Congress intended, in passing three separate Indian Preference Statutes, that Indians on the reservation should receive preference in employment retention during reductions in force carried out by the Bureau of Indian Affairs.

Statutes Involved

(1) 25 U.S.C. § 44 (1964):

> "In the Indian Service Indians shall be employed as herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and the Indian Service. And it shall be the duty of the Secretary of the Interior and the Commissioner of Indian Affairs to enforce this provision."

(2) 25 U.S.C. § 46 (1964):

> "Preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies."

(3) 25 U.S.C. § 472 (1964):

> "The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."

Statement

Factual Background: The petitioner Mescalero Apache Tribe exercises governmental authority over its members residing on the Mescalero Reservation at Mescalero, New Mexico. It appears in this action as representative, *parens patriae*, for all of its members.

The individual petitioners Klinekole and Smith are both members of the Mescalero Apache Tribe, Klinekole (a member of another tribe by birth) by marriage. Both

reside on the Mescalero Reservation and were employed there by the Bureau of Indian Affairs. Until June 28, 1969, both Smith and Klinekole had permanent jobs with the Bureau, Smith as a building repairman and Klinekole as a caretaker. Both were fully qualified for these positions.[1] Neither had three years continuous service with the Bureau,[2] so they were classified as "career conditional" under Civil Service regulations,[3] as applied by the Bureau.

On June 28, 1969, pursuant to a reduction in force, both Klinekole and Smith were discharged from their jobs by the Bureau of Indian Affairs, and replaced by non-Indian employees who had "career" civil service status by reason of a longer period of continuous employment with the Bureau (i.e., in excess of three years) (Record 4, 6-7).

Following their replacement in these positions, Smith and Klinekole were able to obtain only temporary jobs from the Bureau of Indian Affairs. More specifically, the record shows that at the time of the proceedings in the District Court, both were being employed by the Bureau on temporary appointments on a thirty-day basis (Record 37). It was stipulated that there was no existing prospect for permanent employment with the Bureau of Indian Affairs

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[1] The facts in this and the preceding three sentences were stipulated. Record 4.

[2] Petitioner Smith's employment by the Bureau had in fact begun in February 1964, but it had not been continuous. Petitioner Klinekole's employment with the Bureau began in December 1966.

[3] These regulations, 5 C.F.R. § 351.501 (Supp. 1970), recognize three grades of tenure:

> First: Career employees not serving a probationary period;
> Second: Employees serving a probationary period, career-conditional employees, and career employees in obligated positions;
> Third: Indefinite employees, employees serving under temporary appointments, employees in status quo, and employees on other nonstatus, nontemporary appointments.

on the Mescalero Reservation for either petitioner (Record 5).

Unemployment is widespread on Indian reservations. As President Nixon noted in a recent message to Congress:

> "Economic deprivation is among the most serious of Indian problems. Unemployment among Indians is ten times the national average; the unemployment rate is as high as 80 percent on some of the poorest reservations. Eighty percent of reservation Indians have an income which falls below the poverty line; the average annual income for such families is only $1,500." [4]

The Bureau of Indian Affairs' policy regarding Indian preference during reductions in force has a significant impact on reservation unemployment, because the Bureau frequently carries out such reductions in the area, once or twice a year (Record 10).

The Proceedings Below: Petitioners brought suit in the United States District Court for the District of New Mexico seeking, *inter alia*, a mandatory injunction to prevent the government from discharging the individual petitioners and replacing them with non-Indians. The complaint was grounded on the Indian Preference Statutes (see p. 3, *supra*), under which petitioners claimed that

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[4] 116 Cong. Rec. 10801 (daily ed. July 8, 1970). These facts are amplified in a government report, which states as follows:

> "The Indian labor force is estimated at 120,000, approximately 30 percent of the total Indian population. Of these, almost 50 percent are chronically unemployed, compared with unemployment among all nonwhites of around 7.5 percent and United States of 3.5 percent. Because of limited skills, much Indian employment is seasonal or temporary; as such, 50 percent of the Indians who *do* work are 'underemployed'." *Indian Development Program*, by Economic Development Administration, U.S. Department of Commerce, published in *Toward Economic Development for Native American Communities* 356, 358 (1969).

as tribal members employed by the Bureau of Indian Affairs on their own reservation, they were entitled to preference over non-Indians during a reduction in force.

Following a hearing on motion for permanent injunction, the District Court found for the government and dismissed the complaint in accordance with its opinion set forth in Appendix B.

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the judgment in the District Court in accordance with its opinion set forth in Appendix A.

In both the District Court and the Court of Appeals, the defendants, while conceding that the Indian Preference Laws conferred an absolute preference on Indians seeking to be hired by the Bureau of Indian Affairs, urged that they did not in any respect apply to reductions in force.[5] Significantly, the Court of Appeals recognized that this "flat contention" contained "overtones of the age-old complaint of the 'forked tongue' as applied to Indians." (Op. 5a). The Court took this position because the Bureau's own regulations had in fact for many years given Indians a preference, albeit a narrow one, during reductions in force.[6] This preference was based on the Indian Preference Statutes. The Court noted that if these statutes were applicable to reductions in force, it would be "arbitrary" and "beyond the administrative power" to give them effect in some instances but not in others, as in fact the Bureau was doing (Op. 7a).

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[5] In the proceedings in the District Court as well as in the Court of Appeals, the defendants argued as a separate point that petitioners had failed to exhaust their administrative remedies. Although the District Court accepted this contention, it was rejected by the Court of Appeals. See Op. 4a (page references designated "Op." are to the reprint of the Opinion of the Court of Appeals in Appendix A).

[6] See n. 15, p. 12, *infra*.

The Court then proceeded to rule, however, as a matter of "pure interpretation", that the Indian Preference Statutes did not apply to reductions in force. It acknowledged that the legislative history of 25 U.S.C. § 472[7] showed that that statute was intended to integrate Indians into the Bureau of Indian Affairs, as part of the desire of Congress to promote political and economic self-determination for the Indian people (Op. 8a). The Court also acknowledged that the hope that the Bureau would gradually become an Indian service had failed to be realized, although 36 years had elapsed since passage of the statute[8] (*id.*).

Despite these considerations, the Court ruled against petitioners on the ground that Section 472 gave a preference only with respect to "appointment to vacancies", which the Court construed to mean initial employment (Op. 9a). It held that petitioners' interpretation of the statute, while undoubtedly furthering the employment of Indians in the Bureau, would mean the discharge of an indeterminate number of non-Indians whenever there was a reduction in force (*id.*). The Court held that it had not been the intent of Congress to achieve this result[9] (*id.*). The Court's decision was apparently based solely on Section 472, and not on the other Indian Preference Statutes upon which petitioners also rely.

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[7] There is no legislative history relating to the other Indian Preference Statutes relied upon by petitioners, 25 U.S.C. §§ 44, 46.

[8] The Bureau's failure to carry out the wishes of Congress in this regard was recently elaborated upon in a report placed in the Congressional Record by Congressman Olsen. See n. 16, p. 13, *infra*.

[9] The Court stated:

> "Congress intended to promote Indian employment in the B.I.A. but also to provide job security for non-Indian employees by giving Indians only a preference in 'appointment to vacancies'." (Op. 9a).

REASONS FOR GRANTING THE WRIT

A.

The Decision of the Court of Appeals Thwarts the Will of Congress, Clearly Expressed in Three Separate Legislative Acts, to Give a Meaningful Preference to Indians in Employment by the Government on Reservations.

On three separate occasions Congress has expressed its clear intention to encourage the employment of Indians by the Bureau of Indian Affairs, particularly on reservations. The first statute, 25 U.S.C. § 46, passed in 1882, provides that "preference shall *at all times*, so far as practicable, be given to Indians in the employment of clerical, mechanical and other help on *reservations* and *about agencies*." (emphasis supplied). It is plain, we submit, that the purpose of including the words "*at all times*" was to ensure that preference be given to Indians during reductions in force as well as initial employment. This Congressional intent is underscored by the provisions of the second Act, 25 U.S.C. § 44, passed by Congress in 1894, which imposes a mandatory duty on the Bureau of Indian Affairs to employ Indians as "herders, teamsters, and laborers" in the Indian Service. Both these sections apply to petitioners and entitle them, without more, to the relief they seek.

Forty years later, Congress passed yet another statute, Section 12 of the Indian Reorganization Act, 25 U.S.C. § 472, in order to bolster Indian preference. It is ironic, to say the least, that the Court of Appeals below relied upon this very section to justify the "bumping" from relatively menial jobs of two reservation Indians by non-Indians. The central purpose of the section was "to enable the Indian to run his own affairs, to help himself and to

give him the mere privilege of getting a chance to do his own work in the employ of this government"[10] and to facilitate turnover of "the Indian Service to the Indians."[11]

As the legislative history makes clear, the Bureau of Indian Affairs had failed to put the prior Congressional directives contained in 25 U.S.C., §§ 44 and 46 into effect; so that by 1934 the Bureau actually employed proportionately fewer Indians than in 1900.[12] Thus Senator Norbeck stated during the hearings on the bill that became the Indian Reorganization Act of 1934:

> "I think we have utterly fallen down in the present system. The Indian has been excluded. The reservation has been filled up with white people who live off the Indians." *Hearings on S. 2755 before the Senate Committee on Indian Affairs*, 73rd Cong., 2d Sess., pt. 2, at 259 (1934).

Section 472 can be reasonably construed as recognizing Indian preference on reductions in force. To be sure, the second sentence speaks only of "appointment to vacancies". But the first sentence of Section 472 clearly directs that separate standards are to be established to govern the employment of Indians hired by the Bureau of Indian Affairs. Given the clear purpose of this section—to advance Indian employment in the Bureau—it makes no sense to construe it as applying these standards to initial employment only, and not to reductions in force.

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[10] See testimony of John Collier, Commissioner for Indian Affairs, *Hearings on H.R. 7902 before House Committee on Indian Affairs*, 73rd Cong., 2nd Sess., pt. 1, at 38 (1934).

[11] *Id.* at 58.

[12] Memorandum on S. 2755 submitted to the Senate Committee on Indian Affairs by John Collier, Commissioner for Indian Affairs, reprinted in *Hearings on S. 2755 before Senate Committee on Indian Affairs*, 73rd Cong., 2nd Sess., pt. 1, at 19 (1934).

Indeed, an important objective of Section 472 was to establish a separate Indian civil service, completely outside of standard civil service requirements.[13] In subjecting its Indian employees to normal civil service regulations during reductions in force, the Bureau has plainly contravened this Congressional objective.

Moreover, there is nothing in Section 472 to justify its interpretation by the Court of Appeals as undercutting the preference guaranteed by the earlier statutes. The Court of Appeals emphasized the fact that the original language of Section 472 had been modified to include the words "appointment to vacancies", which in the Court's view manifested a Congressional intention to "provide job security for non-Indian employees" during reductions in force (Op. 9a). But the legislative history does not support this position. The bill as initially drafted had provided for the *immediate* displacement of a non-Indian employee by any qualified Indian applicant who sought a job with the Bureau.[14] To avoid this occurrence Congress changed the section to include the reference to "appointment to vacancies". Inasmuch as there were few Indian employees in 1934 by reason of the Bureau's failure to follow the earlier Congressional directives, the question of Indian retention during reductions in force was not the issue before the Congress. In short, there is

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[13] See, e.g., 78 Cong. Rec. 9270, 11727 (1934); *Hearings on H. R. 7902 before House Committee on Indian Affairs*, 73rd Cong., 2nd Sess., at 39 (1934). The Interior Department's own publication *Federal Indian Law* (U.S. Gov. Print. Off. 1958) states at page 536:

> "[25 U.S.C. § 472] contemplates the establishment within the Interior Department of *a special civil service for Indians alone.*" (Emphasis supplied.)

[14] See, e.g., *Hearings on S. 2755 before Senate Committee on Indian Affairs*, 73rd Cong., 2nd Sess., pt. 1 at 32 (1934).

no justification for reading into the statutory language of Section 472 a broader intention to preclude Indian preference during reductions in force merely because Congress, in buttressing Indian preference in employment to vacancies, decided against immediate displacement of all non-Indians by Indian applicants.

We submit that the Court's construction of Section 472 completely negates the purpose of the section, which, as the Court itself acknowledged, was designed to create "an Indian Service predominantly in the hands of educated and competent Indians" (Op. 8a). During the hearing before the District Court, a witness from the Bureau of Indian Affairs testified that the Bureau had conducted two reductions in force per year in the area in recent times, and once a year before that (Record 10). By refusing to give Indians an absolute preference during such reductions in force, the Bureau makes it difficult for them to achieve the period of continuous service required to reach full career status.

The Court of Appeals justified its decision on the ground that unless Indian preference were limited to initial employment only, job security for non-Indian employees would be lost (Op. 9a). On the Court's construction of the Indian Preference Statutes, by contrast, Indian employees lose job security. Job security cannot be guaranteed to all employees during reductions in force. Given a clear Congressional directive that the Bureau of Indian Affairs is eventually to become a predominantly Indian agency, the only possible conclusion is that where a choice has to be made between job security for Indians and job security for non-Indians, Indians are to be preferred.

It may also be observed that loss of a reservation job generally involves much greater hardship for an Indian than a non-Indian, owing to the Indian's strong attachment to his land.

> "Unlike other minority groups, the Indian's relation to his land is unique; his race, even today, remains extraordinarily dependent upon and involved with his actual surroundings." *Indians: Better Dead Than Red*, 42 S.Cal.L. Rev. 93, 101 (1969).

The Bureau of Indian Affairs itself recognizes that the Indian has "an intense attachment to native soil, a reverent disposition towards habitat and ancestral ways, and a restraint on individual self-seeking in favor of family and community." *Economic Development of Indian Communities*, published in *Toward Economic Development for Native American Communities*, *supra*, n. 4, p. 5, at 331. The constraints against relocating in order to take another job are clearly far less in the case of a non-Indian displaced from a reservation job.

From its "forked tongue" description of the government's contention that the Indian Preference Statutes did not apply to reductions in force (Op. 5a), it is plain that the Court of Appeals was troubled by the fact that the Bureau had in fact for many years given limited recognition to these statutes during reductions in force.[11] Indeed, as the Court of Appeals recognized, it would be

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[11] During reductions in force, under the Bureau's practice, Indians receive preference within particular status subgroups. The relevant portions of the Bureau's Indian Affairs Manual read as follows:

> "1. . . . Reduction in force actions will be made in accordance with rights of career employees in observance of the Veterans' and Indian preference laws. . . .
>
> "2. . . . In applying the retention preference regulations in reduction in force actions, employees with Indian preference shall be placed above all competing non-Indians in the same subgroup. . . ." 44 B.I.A.M. 351.1-2 (emphasis added).

"arbitrary" and "beyond the administrative power" to dilute an applicable Indian preference as the Bureau had done (Op. 7a). The defendants concede that the Indian Preference Statutes provide an absolute preference for Indians on initial employment, completely pre-empting regular civil service requirements. We submit that if these statutes apply to reductions in force at all—and the Bureau through its practice acknowledges that they do—then the employment preference given to Indians during such reductions must likewise be absolute, under the terms of the statutes.

The Bureau of Indian Affairs, unable to deny that the Indian Preference Statutes apply to reductions in force, has chosen to interpret the statutes in a way that will cause least inconvenience to itself." Quite apart from its arbitrary and unauthorized nature, this conduct is wholly inconsistent with the "high standards for fair dealing required of the United States in controlling Indian affairs." " *U. S.* v. *Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 356 (1941). *See also, U. S.* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 47 (1946).

" The Bureau has apparently construed the preference just as narrowly in other respects, in particular with regard to promotions. A report recently placed in the Congressional Record by Congressman Olsen specifically criticizes the Bureau for failing to recognize Indian preference with regard to promotion. The report reveals that in November 1969, 75 percent of the Indian GS employees with the Bureau had grade levels of 6 or less, whereas almost 80 percent of non-Indian GS employees had levels above 6. 74 percent of Indian wage board employees had salaries below $6,000 while 66 percent of non-Indian wage board employees received $6,000 or more. 116 Cong. Rec. 10372 (daily ed. December 14, 1970).

" In its dealings with dependent Indians and Indian tribes, this Court has repeatedly held that the federal government and its officials act as guardians for the Indians. *United States* v. *Sandoval*, 231 U.S. 28, 45-46 (1913); *United States* v. *Kagama*, 118 U.S. 375 (1886). As a fiduciary to the Indians, the United States is held to a "moral obligation of the highest responsibility and trust," *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942).

[*Footnote continued on next page*]

B.

The Decision of the Court of Appeals Defies the Long-Standing Rule of Construction That Ambiguities Are to Be Resolved in Favor of Indians.

In our submission, the language and history of the Indian Preference Statutes makes it quite plain that they were intended to apply to reductions in force as well as to initial employment. If, however, any ambiguity remains, that ambiguity should be resolved in favor of petitioners, in accordance with the rule laid down many years ago by this Court, and often reiterated by it, that in construing federal statutes dealing with Indians,

> ". . . doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years . . . ." *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912).[18]

The Court of Appeals believed that an ambiguity existed, for it rejected the government's contention that the Indian Preference Statutes unambiguously denied relief to the petitioners (Op. 5a). But in resolving the apparent ambiguity, it totally ignored the mandatory rule of construction set out above. In so doing the Court was clearly in error.

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and "bound by every moral and equitable consideration to discharge its trust with good faith and fairness." *United States* v. *Payne*, 264 U.S. 446, 448 (1924).

[18] See also, *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956); *U.S.* v. *Santa Fe Pacific R.R. Co.*, 314 U.S. 337, 354 (1941); *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); *Alaska Pacific Fisheries* v. *U.S.*, 248 U.S. 78, 89 (1918).

C.

The Correct Application of the Indian Preference Law to Reductions in Force Is of Signal Importance to the Future of Thousands of Indians; Moreover, This Case Provides the Court With a Rare Opportunity to Vindicate the Will of Congress With Regard to Indian Preferences.

The plight of the American Indian on the reservation is well-known. A desperate picture of wide-scale unemployment and abject poverty exists. The Indian is truly the forgotten American:

> "Indian reservations, as alienated socially as urban ghettoes and far more isolated geographically, are the purest examples of underdeveloped enclaves within American society: infant mortality is seventy percent higher than the national average; almost half the Indian labor force is unemployed; the predominant attitude is one of hopelessness." *The Indian: The Forgotten American* (81 Harv. L. Rev. 1818, 1838-9, 1968).[29]

On the majority of Indian reservations, the chief employer is the Bureau of Indian Affairs.[30] In November 1969, the Bureau had a total of 15,524 employees, of whom 8,236 were Indians.[31] If the decision of the Court of Appeals is permitted to stand, opportunities for thousands

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[29] *See also, Toward Economic Development for Native American Communities, supra* n. 4, p. 5, at 302.

[30] *Id.* at 112. Few other jobs are available. Only three percent of the total Indian labor force of 120,000 has industrial employment. *Id.* at 113. *See also* pp. 69, 342.

[31] 116 Cong. Rec. 10372-3 (daily ed. December 14, 1970).

of reservation Indians to gain meaningful employment with the Bureau will remain restricted, particularly because of the frequency with which the Bureau engages in reductions in force. It is obvious that under the Bureau's existing interpretation of the applicable laws and regulations, substantial numbers of Indians in the lower-ranking positions will be unable to obtain the length of continuous service necessary to achieve protected status. The decision of the Court below, if sustained, will make it likely that the Congressional purpose—first expressed more than 80 years ago—will continue to be thwarted and the Bureau of Indian Affairs will never become the predominantly Indian service that Congress intended.[22]

The result in this case underscores the need for this Court to review the matter. Here, Indians on the reservation are laid off their jobs and face the prospect of unemployment, while the jobs which they are perfectly capable of performing are taken over by non-Indians. This is clearly detrimental to the development of the Indians and contrary to the will of Congress. It symbolizes the failure of the government to effectuate a meaningful employment policy in defiance of clear directions from Congress. This Court should overturn such a result.

For many decades the Indians on the reservation have been wards of the government, and more particularly of the Bureau of Indian Affairs. Because of this status, Indians have rarely sought to challenge the policies of the Bureau which governs them.[6] For example, there are no

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[22] Although in November 1969, Indians comprised slightly more than half of the Bureau's employees (see text accompanying n. 21, pp. 15-16, *supra*), the vast majority were in low-ranking jobs. 75 percent of the Indian GS employees had grade levels of 6 or less, and 74 percent of the Indian wage board employees had salaries below $8,000. See n. 16, p. 13, *supra*.

reported decisions involving any of the three Indian Preference Statutes in issue in this case, despite the obvious questions concerning the zeal and initiative displayed by the Bureau in effectuating them over an eighty-year period. Accordingly, we submit that this matter presents a singular opportunity for the Court to review the Indian Preference Statutes and give them the significant effect which Congress intended.

CONCLUSION

For the reasons stated above, this petition for certiorari should be granted.

Respectfully submitted,

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December 1970.

APPENDIX A

Opinion and Order of Court of Appeals Affirming Order of District Court—October 5, 1970

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

September Term, 1970

No. 40-70

MESCALERO APACHE TRIBE, an Indian Tribe duly organized under the laws of the United States of America, EUGENE KLINEKOLE, CHARLES SMITH, JR.,

Plaintiffs-Appellants,

v.

WALTER J. HICKEL, Secretary of the Interior, U. S. DEPARTMENT OF INTERIOR, LOUIS R. BRUCE, Commissioner of Indian Affairs, E. M. DAVIDSON, Albuquerque Area Personnel Officer, Bureau of Indian Affairs,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Reid P. Chambers, Washington, D.C. (George E. Fettinger of Fettinger, Bloom & Overstreet, Alamogordo, New Mexico, Stuart J. Land and F. Browning Pipestem of Arnold & Porter, Washington, D.C. were with him on the brief) for Appellants.

Carl Strass, Department of Justice, Washington, D.C. (Shiro Kashiwa, Assistant Attorney General, Victor R. Ortega, United States Attorney, John A. Babington, Assistant United States Attorney, Albuquerque, New Mexico, and George R. Hyde, Department of Justice, Washington, D.C. were with him on the brief) for Appellees.

Lee J. Sclar (George F. Duke, Richard B. Collins, Jr. and Robert J. Donovan, Berkeley, California, were with him on the brief) for California Indian Legal Services, Inc., Amicus Curiae.

Before Lewis, Chief Judge, Pickett and Hickey,* Circuit Judges.

Lewis, Chief Judge.

This case, as one of first impression, questions the extent of the employment preference with the Bureau of Indian Affairs (B.I.A.) given by statute to Indians. Specifically, we are asked to decide whether the preference in appointment, established by 25 U.S.C. §§ 44-47, 472, comprehends similar preferential treatment to Indians when agency reductions in force are made.[1] Plaintiffs-appellants Klinekole and Smith instituted this action in the United States District Court for the District of New Mexico whereby they sought mandatory injunctive relief requiring their reinstatement as employees of the Mescalero Agency, an adjunct of the B.I.A. Jurisdiction of the controversy was accepted

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* Judge Hickey, since deceased, heard the arguments in this case but did not participate in this decision.

[1] The parties accept the basic constitutional validity of these statutes as an unquestioned premise for the limited issue which they here present. By considering the case in its present posture we do not give judicial comfort to that premise. No constitutional issue is before us.

by the District Court for the District of New Mexico presumably under 5 U.S.C. §704.[2]

According to the stipulations of fact, Klinekole, a former caretaker, and Smith, a building repairman, had been separated from their jobs with the Mescalero Indian Agency within the B.I.A. pursuant to civil service and agency regulations. Both appellants were one-quarter Indian or more and affiliated with the Mescalero Tribe, Smith by marriage. At the time the reduction in force was carried out, during June 1969, Klinekole and Smith were classified "career-conditional" employees, signifying less than three years' continuous service with the B.I.A.; the vacancies created by their separation were filled by non-Indian "career" employees, or those with the requisite three-year tenure. Appellants were thus separated from the service because their tenure status was inferior to that of other affected employees.

After a combined preliminary and final hearing on the issuance of the injunctions, the court below dismissed the action on the dual grounds that 25 U.S.C. §§ 44-47, 472, are inapplicable to reductions in force and that, in any event, appellants had failed to exhaust their administrative remedies.

This is not a case where administrative proceedings are specifically provided by statute and appellants' basic contention is that the B.I.A. has exceeded its statutory authority rather than misapplied a valid regulation. No facts are in dispute, and the determinative issue—whether the B.I.A. can discharge qualified Indians while retaining non-

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[2] Jurisdiction was asserted under 28 U.S.C. §§ 1331(a) (federal question), 1346(a)(2) (civil action against the United States founded on act of Congress), 1361 (mandamus), 1362 (civil action brought by Indian tribe under law of United States), and 5 U.S.C. § 704 (judicial review of final, non-discretionary agency action). Clearly, 5 U.S.C. § 704 was the least questionable basis.

Indians in the same jobs—is solely a matter of statutory interpretation. The resolution of that issue requires neither administrative expertise nor the exercise of discretion. Since administrative appeals could only provide additional statutory interpretations, which would not significantly aid in judicial review, we can see no compelling reason for postponing a decision on the merits. *See* McKart v. United States, 395 U.S. 185; Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562; Pan Am. Petroleum Corp. v. Pierson, 10 Cir., 284 F2d 649, 656-57, *cert. denied* 366 U.S. 936. We conclude there is no jurisdictional block to review and pass to a consideration of the merits.

None of the three statutes relied on by appellants deals directly with reductions in force.[3] However, appellants point to the phrase "shall be employed . . . where practicable . . ." as contained in § 44, and the word "employment" in § 46 and urge that the statutes contemplate a continuing relationship. We consider such an interpretation

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[3] 25 U.S.C. § 44 provides:

> In the Indian Service Indians shall be employed as herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and the Indian Service. And it shall be the duty of the Secretary of the Interior and the Commissioner of Indian Affairs to enforce this provision.

25 U.S.C. § 46 provides:

> Preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies.

25 U.S.C. § 472 provides:

> The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

to be strained and untenable. A similar argument cannot be extended to § 472 for in this section the preference is specifically limited to "appointment to vacancies." One illustration of how these popularly-termed "Indian preference laws," pertinently § 472's waiver of civil service laws, create an Indian preference in appointment is that a non-veteran Indian of quarter blood, such as either appellant in this case, will be given preference over a non-Indian veteran competing for the same position within the B.I.A. Presumably, civil service preferences would come into play again in favor of an Indian veteran applying for the same appointment sought by a non-veteran Indian. *See* Memorandum of the Solicitor, Department of the Interior, "Appointment of Indian Positions Restricted to Veterans," June 4, 1954 n.6. Since these applications of the subject statutes are clearly proper and within the clear and precise wording of the statutes we would ordinarily end our inquiry at this point with a simple indication of agreement with the government's contention that the statutes are unambiguous and cannot be used to afford appellants a remedy. But the government's flat contention contains overtones of the age-old complaint of the "forked tongue" as applied to Indians.

For many years the government *has* applied the subject employment preference statute as having limited effect in matters of reduction in force. This policy is reflected in B.I.A.'s Indian Affairs Manual which provides in pertinent part:

> .1 *Policy.* The Bureau will endeavor to reassign employees facing reduction in force to positions in which they will render the most efficient and satisfactory service. Reduction in force actions will be made in accordance with rights of career employees in observance of

the Veterans' *and Indian preference laws* and the regulations established by the Civil Service Commission. The term career or career conditional used in this chapter will apply to employees in the competitive service and Indian preference eligibles in the excepted service.

.2 *Indian Preference.* Employees eligible for Indian preference are those with ¼ or more degree Indian blood, regardless of the type of appointment they have received and those employees with lesser degree of Indian blood to whom preference was extended at the time of appointment. There are a few individuals in the latter category who were appointed in earlier years, before one-fourth degree Indian blood was required for preference in employment.

In applying the retention preference regulations in reduction in force actions, employees with Indian preference shall be placed above all competing non-Indians in the same sub-group, regardless of whether the positions are in the competitive or excepted service. In observing reassignment rights of employees with Indian preference, those individuals, for example, in subgroup IA-1 have reassignment rights within the Bureau only to other positions for which they are qualified in other competitive levels when occupied by employees in subgroup 1-B or lower. 44 BIAM 351.1-2 (emphasis added).

This policy in practical effect and as testified to by two government witnesses would have allowed Klinekole and Smith, both non-veterans, to retain their employment over non-Indian veteran employees had plaintiffs been in the same subgroup, i.e. had they had career status. Apparently this policy and its result is an attempt to give some recognition to the requirements of statutes pertaining to civil

service reductions in force. 5 U.S.C. §§ 3501, 3502 provide for civil service preferences when reductions in force are made. "Tenure of employment" and "military preference" are two classifications which § 3502 directs should be given effect in the hierarchy of preferences set up by the Civil Service Commission. By regulation the B.I.A. is required to classify according to tenure employees in "excepted" service, 5 C.F.R. § 351.502, to which Indian appointees in B.I.A. agency service are subject. 5 C.F.R. § 213.3112(a)(7). A fair interpretation of the civil service reduction preference statutes and the cited regulations is that subgrouping based on tenure, with the resultant "career" and "career-conditional" classifications, is civil service classification. A government witness testified that civil service regulations, along with those of the agency, controlled reduction questions. In the same vein the government has argued that 25 U.S.C. § 472, quoted *supra*, applies only to appointments and, therefore, that §§ 3501 and 3502 generally control regarding preferences during reductions in force, thereby confining waiver of civil service requirements to § 472. Yet the B.I.A. by regulation has adopted a policy of continuing Indian preferences to agency reductions in force, but only when Indians and non-Indians are in the same tenure subgroup.

In recognition of the expertise of the B.I.A. we have no quarrel with what may be the pragmatic effect of its practice of applying but a limited preference to Indians in the matter of force reduction. But to interpret the subject statutes as authorizing in some instances an Indian preference on retention of employment and to deny the same effect in other instances seems clearly to be arbitrary, and no matter how desirable, to be beyond the administrative power. Our inquiry must thus revert to one of pure interpretation of the subject statutes.

Both below and before this court, all parties have catalogued available legislative history on § 472, consisting of House and Senate reports, hearings, and debates. 25 U.S.C. § 44, 46, part of the Indian Appropriations Act, had no documented history prior to enactment. Our examination of the legislative history relevant to the passage of § 472 supports appellants' contention that it was intended to integrate the Indian into the government service connected with the administration of his affairs.[4] Congress was anxious to promote economic and political self-determination for the Indian. Specific concern was directed to reforming the B.I.A., which exercised vast power over Indian lives but was staffed largely by non-Indians. Through the preference given to Indians by § 472, it was hoped that the B.I.A. would gradually become an Indian service predominantly in the hands of educated and competent Indians.

During the thirty-six years since the passage of § 472 it might be expected that this initial hope of a predominantly Indian B.I.A. would have been realized through the initial hiring preference. As the non-Indian employees retired or moved on to other jobs, competent Indians were expected to have taken their place. Unfortunately, this has apparently not happened, especially in the policy-making positions. See *The Indian: The Forgotten American*, 81 Harv. L. Rev. 1818, 1820 (1968). Whether the failure results from the policies of the B.I.A. or from a lack of qualified Indian applicants is a matter of continuing concern.

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[4] *See generally* S. Rep. No. 1080, 73d Cong., 2d Sess. at 1 (1934); *Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. at 39 (1934); *Hearings on S. 2755 Before the Senate Comm. on Indian Affairs*, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 9270 (remarks of Senator Hastings), 11123 (remarks of Senator Wheeler), 11727, 11729, 11731-32 (remarks of Representative Howard) (1934).

Appellants now urge us to adopt an interpretation of the preference statutes that would undoubtedly further employment of Indians in the B.I.A. but at the expense of discharging an indeterminate number of non-Indians whenever there is a reduction in force. This was clearly not within the original intent of Congress. The language of § 472 was specifically limited to "appointments to vacancies" because of concern that the section as originally drafted would allow qualified Indian applicants to immediately displace "white"[5] employees of the B.I.A. See *Hearings on S. 2755 Before the Senate Comm. on Indian Affairs*, 73d Cong., 2d Sess. at 32 (1934). Representative Howard, one of the sponsors of the legislation, remarked during the congressional debates that § 472 "does not mean a radical transformation overnight or the ousting of present white employees." 78 Cong. Rec. 11731 (1934).

Appellants contend that a reduction in force, when a choice must be made between displacing Indian employees or non-Indian employees, presents a substantially different situation from the ousting of non-preferred employees by Indian applicants. We disagree. Congress intended to promote Indian employment in the B.I.A. but also to provide job security for non-Indian employees by giving Indians only a preference in "appointment to vacancies." This security is lost if the Indian preference statutes are applied to reductions in force since inevitably all non-Indian employees would be "ousted" by such reductions. Besides posing a threat to non-Indians now employed by the B.I.A., the loss of job security would also constitute a significant deterrent in recruiting non-Indians for B.I.A. jobs. Although qualified Indians are to be actively sought and ac-

[5] The choice of this adjective is not ours. This racial distinction is repetitive in the congressional debates.

corded a preference in initial hiring, it may still be necessary to employ non-Indians whenever it is not "practicable" to do otherwise. And when so hired, such employees are the "present" employees thirty-six years subsequent to the enactment of the subject statutes.

Accordingly, we hold that the Indian preference statutes do not entitle appellants to the relief sought.

AFFIRMED.

APPENDIX B

Opinion and Order of District Court Dismissing Complaint—October 10, 1969

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

No. 8133 Civil

MESCALERO APACHE TRIBE, an Indian Tribe duly organized under the laws of the United States of America, EUGENE KLINEKOLE, CHARLES SMITH, JR.,

Plaintiffs,

vs.

WALTER J. HICKEL, Secretary of the Interior, Washington, D. C.

U. S. DEPARTMENT OF INTERIOR, Washington, D. C.

T. W. TAYLOR, Acting Commissioner of Indian Affairs, Washington, D. C.

E. M. DAVIDSON, Area Personnel Officer Albuquerque Area, Bureau of Indian Affairs, Albuquerque, New Mexico,

Defendants.

MEMORANDUM OPINION

The plaintiffs Eugene Klinekole and George Smith, Jr., both members of the Mescalero Apache Tribe, were separated from their employment with the Department of Interior's Bureau of Indian Affairs at Mescalero Agency on June 28, 1969, pursuant to a reduction in force in the

agency. Both plaintiffs held career conditional status at the time of their separation, and neither was a veteran. Pursuant to the pertinent Civil Service rules and regulations, they were replaced by two non-Indians employed in the same agency, both of whom had career employee status and were veterans.

The plaintiffs and the Mescalero Apache Tribe then filed this suit, seeking to enjoin the defendants from replacing the plaintiffs Klinekole and Smith with non-Indians and from offering all new or unfilled positions with the Mescalero Agency to any non-Indian before offering such positions to members of the tribe residing at Mescalero. Plaintiffs also want Klinekole and Smith reemployed in their former positions.

The plaintiffs claim that the defendants' actions were in contravention of *25 U.S.C.A. §§ 44, 46, and 472*, as well as the Interior Department's Indian Affairs Manual. Essentially, their claim is that these statutes entitle Indian employees of the Bureau of Indian Affairs, including the two named plaintiffs, to an absolute preference over non-Indians in a reduction in force without regard to the normal Civil Service regulations governing a reduction in force.

Under the above Indian preference statutes, both sides agree, Klinekole and Smith would have a preference over the two non-Indians if all four were making initial applications for the jobs. The plaintiffs contend that the statutes cover not only the initial employment situation but also extend the Indian preference to continued employment where, as here, a reduction in force is proposed for a competitive area.

They point to the language "shall be employed" and "in the employment" in §§ 44 and 46 of the Act to support their position. Such language, they contend, signifies a continuing process and is intended to mean that Indians are to

serve on a continuing basis in the Indian Service. They further assert that the language of § 472 of the Act, even though it refers only to "appointment," can be construed so as to support their position, in light of its legislative history, as delineated in their brief.

To hold that the above sections do not apply to retention as well as to appointment, they claim, would create an anomaly difficult to square with the expressed policy of favoring the mandatory employment of Indians in all positions throughout the Bureau of Indian Affairs. Thus, they argue, the Indian preference statutes supersede the normal Civil Service rules and regulations pertaining to reductions in force and make them inapplicable to the present situation.

The defendants contend that the plaintiffs and other Indians are given no preference right to retention during a reduction in force under the statutes.

On the contrary, they contend that not only is no such right conferred by the statutes, but that the pertinent sections applicable to a reduction in force, *5 U.S.C.A. §§ 3501 (b), 105, 101, and 3502*, clearly apply to the facts of this case. Their position is that these statutes are in no way inharmonious with the Indian preference statutes, since the latter apply only to initial appointment.

They further rely upon the testimony of their witnesses at the hearing in this matter that the B.I.A. has for many years carried out reductions in force in exactly the same manner as was followed here. They claim that this fact, coupled with the lack of judicial decisions construing the preference statutes, entitles their long-standing administrative interpretation to great deference under *Udall* v. *Tallman*, 380 U.S. 1 (1965).

Additional reliance is placed upon Executive Orders 7916, 8043, and 8383, *3 C.F.R. 1938—43 350, 1938—43 452*, and

1938—43 636, to demonstrate that at no time has § 472 of the Act taken B.I.A. positions out of the Civil Service.

The defendants' position finds more support than plaintiffs' in the statutes themselves, as well as in the legislative history cited by both sides. Only a strained construction of the preference statutes will result in the interpretation that they are intended to apply to reductions in force, and this conclusion is equally applicable to the cited legislative history.

Accordingly, it can only be concluded that the Indian preference statutes were not intended to and do not cover reductions in force. It therefore follows that the normal Civil Service rules and regulations covering reductions in force apply to the present case, and, under such application to the replacement of the plaintiffs Klinekole and Smith by two career employees.

Both sides agree that plaintiffs have pursued no administrative remedies under the civil service laws. Inasmuch as the civil service administrative procedures for contesting their dismissal were not employed by the plaintiffs, as they should have been, any action such as the present one is at the least premature.

The question of the Mescalero Apache Tribe's standing need not be reached, in view of the conclusion that the preference statutes have no application to reductions in force within the B.I.A.

A Judgment against the plaintiffs and in favor of the defendants will be entered herein together with this Memorandum Opinion giving the Court's reasons therefor.

HOWARD BRATTON
United States District Judge

THIS COPY SERVES AS NOTICE OF ENTRY
ON OCTOBER 10, 1969

E. E. GREESON, *Clerk*

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

No. 8133 CIVIL

MESCALERO APACHE TRIBE, an Indian Tribe duly organized under the laws of the United States of America, et al.,

Plaintiffs,

vs.

WALTER J. HICKEL, Secretary of the Interior, Washington, D. C., et al.,

Defendants.

FILED
AT ALBUQUERQUE
OCT 10 1969
E. E. GREESON
CLERK

This cause having come on for hearing before the Court, and the Court having filed herein a Memorandum Opinion finding in favor of the defendants and against the plaintiffs; Now, Therefore,

IT IS THE JUDGMENT OF THE COURT that the complaint herein be, and it hereby is, dismissed on the merits, and the action is dismissed.

IT IS THE FURTHER ORDER OF THE COURT that the defendants recover of the plaintiffs their costs of action.

HOWARD BRATTON
United States District Judge

THIS COPY SERVES AS NOTICE OF ENTRY
ON OCTOBER 10, 1969

E. E. GREESON, *Clerk*